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An Analysis of Austin Lawyers Guild v. Securus Technologies, Inc.: The Constitutional and Ethical Implications of Using Illegally Recorded Attorney–Client Telephone Conversations as Derivative Evidence

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COMMENT

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I. INTRODUCTION

You have the right to remain silent; you have the right to an attorney.[1] Nearly everyone recognizes this phrase from the landmark case *Miranda v. Arizona*,[2] which demonstrates the significance of the attorney–client relationship and the right to consult with counsel confidentially. This Comment discusses the pending class action lawsuit, *Austin Lawyers Guild v. Securus Technologies, Inc.*,[3] which is currently before the United States District Court for the Western District of Texas, Austin Division. The plaintiffs, a group of Austin criminal defense attorneys, allege the Travis County Sheriff's Office illegally recorded attorney–client telephone calls and turned them over to prosecutors. Such actions constitute a violation of the attorney–client privilege and infringe upon the constitutional rights of pretrial detainees. The plaintiffs plan to advance arguments grounded in the First, Fourth, Fifth, Sixth, and Fourteenth Amendments[4] of the

1. Statements stemming from custodial interrogation, whether inculpatory or exculpatory, may not be used by prosecutors unless the interrogators demonstrate procedural safeguards effective to secure the privilege against self-incrimination. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966) (holding appropriate and effective procedural safeguards are to be used to protect one's right against self-incrimination and to inform a defendant of the right to counsel).

2. Miranda v. Arizona, 384 U.S. 436 (1966).

3. *See generally* Austin Lawyers Guild v. Securus Techs., Inc., No. 1:14-cv-366, 2014 WL 1689693 (W.D. Tex. Apr. 29, 2014) (providing the plaintiff's complaint).

4. Constitutional and statutory provisions protect the criminal defendant at every stage of the

United States Constitution and in alleged violations of federal and state wiretap laws.

The lawsuit encompasses a myriad of issues that affect the attorney–client relationship such as the privileges it entails and the degree of confidence and trust between lawyer and client. Attorney–client privilege is one of the oldest concepts in our legal system, yet it is still unclear from where exactly it derives and how it interplays with the First, Fourth, Fifth, Sixth, and Fourteenth Amendments.[5] It is clear, however, that fostering open communication and trust between a client and his or her attorney is of utmost importance if the justice system is to operate effectively. This pending case also raises ethical considerations: What is a defense attorney to do when the prosecution uses illegally obtained evidence? How will prosecutors be held responsible for their unethical actions? If the allegations against the defendants prove true, the court must not only afford the plaintiffs relief but also send a message to state officials and prosecutors that the attorney–client relationship is not to be improperly intruded upon.

II. THE HISTORY OF THE ATTORNEY–CLIENT PRIVILEGE

The attorney–client privilege is the oldest common law privilege for confidential information.[6] The Supreme Court of the United States has long recognized the existence of the privilege and understood it is needed for attorneys to be able to advocate effectively on behalf of their clients.[7]

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proceedings and impose important limits on the government's ability to gather and present evidence. *See* Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713, 729 (1999) (reiterating the Fourth, Fifth, and Sixth Amendments to the Constitution impose important procedural limits on the authority of the government to gather evidence and conduct a criminal trial). The federal Constitution provides arrestees and pretrial detainees with baseline protections that state constitutions cannot sink below; therefore, a state can only add to the protections afforded to arrestees and pretrial detainees. *See* Caroline Davidson, *State Constitutions and the Humane Treatment of Arrestees and Pretrial Detainees*, 19 BERKLEY J. CRIM. L. 1, 18 (2014) (clarifying states "can only add to the protections of the federal [C]onstitution").

5. *See* Robert P. Mosteller, *Admissibility of Fruits of Breached Evidentiary Privileges: The Importance of Adversarial Fairness, Party Culpability, and Fear of Immunity*, 81 WASH. U. L.Q. 961, 994 (2003) (asserting confidential communications between attorneys and clients may be protected under the "Sixth Amendment right to counsel and the Due Process Clauses of the Fifth and Fourteenth Amendments").

6. *See* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (recognizing the historical roots of the attorney–client privilege and the importance of maintaining confidentiality between a client and an attorney); *see also* Max Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 CAL. L. REV. 487, 488 (1927) (noting in Roman times, out of loyalty to the families they served, attorneys were considered incompetent to testify against clients).

7. In 1888, the Court in *Hunt v. Blackburn* held:

The American legal system largely developed from the English legal system,[8] and the concept of attorney–client privilege, as we know it, is said to have originated during the Elizabethan period.[9] However, there appear to be no American cases on the subject until the 1820s.[10] In the 1970s, the Supreme Court held confidential disclosures made by clients to attorneys to obtain legal services are privileged and the privilege only applies where necessary to accomplish its purpose.[11] The privilege is,

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> The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.

Hunt v. Blackburn, 128 U.S. 464, 470 (1888); *see also* Trammel v. United States, 445 U.S. 40, 51 (1980) (recognizing "the imperative need for confidence and trust" for the advocate and counselor to know all that relates to the client's reasons for seeking representation so the professional mission may be carried out).

8. *See* Allen Dillard Boyer, *"Understanding, Authority, and Will": Sir Edward Coke and the Elizabethan Origins of Judicial Review*, 39 B.C. L. REV. 43, 90 (1997) (explaining the influence of Lord Coke's writings on judicial review in 1647 in the General Court of Massachusetts); *see also* Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 10 YALE L.J. 1651, 1652–53 (1994) (noting the ever present effects of historical jurisprudence in modern-day English and American law).

9. *See* R. Aubrey Davis III, *Big Brother the Sneak or Big Brother the Sentry: Does a New Bureau of Prisons Regulation Truly Abrogate the Attorney–Client Privilege?*, 27 HAMLINE L. REV. 163, 171 (2004) (explaining the attorney–client privilege existed before the Constitution and originally belonged to the lawyer as a method to protect his honor); Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney–Client Privilege*, 66 CAL. L. REV. 1061, 1070 (1978) (stating Elizabethan cases do refer to the attorney–client privilege, and although some early cases refer to the privilege as being that of a lawyer, as the rule developed, it now serves to protect the client and his secrets). Today, the privilege belongs to the client, and the lawyer cannot use it for her own protection because the privilege is only available in circumstances where it is necessary for the client's protection. *See* Katherine Ruzenski, Note, *Balancing Fundamental Civil Liberties and the Need for Increased Homeland Security: The Attorney–Client Privilege After September 11th*, 19 ST. JOHN'S J. LEGAL COMMENT. 467, 491 (2005) (discussing a case in which an attorney attempted to assert the attorney–client privilege to serve her own interests).

10. *See* Dixon v. Parmelee, 2 Vt. 185, 188 (1829) (holding the attorney–client privilege belonged to the client and was to apply to communications from the consultation to the termination of the suit). In 1831, the Massachusetts Supreme Judicial Court held:

> The privilege which he claims, is the privilege, not of the attorney, but of the client, and is founded on this consideration, that there would be no safety in dealing with mankind, if persons employed in transactions were compelled to state that which they have learned only by this species of confidence.

Foster v. Hall, 29 Mass. (12 Pick.) 89, 97 (1831). The privilege reached American shores in 1760 and was identical to the doctrine as applied in England, except for the limiting requirement that the communication must have been made in anticipation of litigation. *See* Davis, *supra* note 9, at 172 (providing commentary on the historical origins of the attorney–client privilege and its development into modern jurisprudence).

11. *See* Fisher v. United States, 425 U.S. 391, 403 (1976) (limiting the attorney–client privilege so it protects only disclosures made to obtain informed legal advice).

however, subject to a number of recognized exceptions.[12]

III. WHAT IS COVERED BY THE ATTORNEY–CLIENT PRIVILEGE?

The classic formulation of the attorney–client privilege is:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.[13]

This formulation of the attorney–client privilege contains certain limitations.[14] For example, the communication must be made in the course of seeking legal advice,[15] and the attorney–client privilege cannot be abused for the purpose of seeking advice regarding future wrongdoing.[16] Furthermore, the client may waive the evidentiary privilege

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12. *See* MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 2013) (listing the exceptions to the rule of confidentiality between attorney and client); *see also* TEX. R. EVID. 503(d) (listing the Texas exceptions to the attorney–client privilege).

13. Lloyd B. Snyder, *Is Attorney–Client Confidentiality Necessary?*, 15 GEO. J. LEGAL ETHICS 477, 482–83 (2002). Nearly every judge and lawyer is familiar with or recognizes the name John Henry Wigmore and the monumental treatise he wrote on the topic of evidence law, which promulgated the formulation of attorney–client privilege. *See* Edward J. Imwinkelried, *The New Wigmore: An Essay on Rethinking the Foundation of Evidentiary Privileges*, 83 B.U. L. REV. 315, 315 (2003) (recognizing the importance and significance of Wigmore's treatise to the understanding of evidence and the rules of privilege). The modern formulation of the attorney–client privilege has remained largely the same from the time of Wigmore. *See* Hazard, *supra* note 9, at 1062 (acknowledging the attorney–client privilege ought to apply to communications by an accused criminal made to counsel in contemplation of a defense to a pending or imminent prosecution concerning some completed crime). *But see* Imwinkelried, *supra*, at 317–20 (critiquing the premise upon which Wigmore states the attorney–client is founded and proposing courts move away from the Wigmore's still-highly-regarded, instrumental theory).

14. *See* Davis, *supra* note 9, at 173 (commenting on the implicit limitations in the rules of attorney–client privilege and noting "the client's knowledge of underlying facts is not protected" from disclosure, thus, creating "a distinction between the contents of a lawyer–client communication and the contents of a client's memory").

15. *See* EVID. 503 (stating the client has a privilege to prevent disclosure of communications made to facilitate legal services to the client); Snyder, *supra* note 13, at 482–83 (explaining the formulation of the attorney–client privilege and its implicit limitations).

16. *See* United States v. Zolin, 491 U.S. 554, 562 (1989) (holding attorney–client privilege is essential to our system of justice and while it protects the confidences of wrongdoers, it may not be abused to protect communications made in anticipation of future wrongdoings); Upjohn Co. v. United States, 449 U.S. 383, 392 (1981) (emphasizing a client's communications are to be confidential so the attorney may properly assist the client to comply with the law); Davis, *supra* note 9, at 175 (recognizing the crime-fraud exception is inclusive of the entire communication, even portions that were not related to the anticipated crime or fraud, rendering the whole communication discoverable). Since *Upjohn* was decided, there has been an unprecedented expansion of the crime-fraud exception

in some circumstances.[17] Inadvertent disclosure of privileged communication does not constitute an effective waiver of the attorney–client privilege because the waiver must be made intentionally.[18] Naturally, it follows that, if a defendant is unknowingly recorded while speaking to his or her attorney for the purpose of receiving legal advice, the disclosures made by the client are inadvertent. Importantly, the attorney–client privilege is an exclusionary rule of evidence, and privileged information that does not fall under an applicable exception should not be used against the accused at trial.[19]

IV. POLICY REASONS FOR THE ATTORNEY–CLIENT PRIVILEGE

During the Elizabethan period, the attorney–client privilege was based on the notion that an attorney was a "gentleman" and could not betray the oath made to the client.[20] By the eighteenth century, the justification for the privilege became more utilitarian and has survived over time.[21] In 1829, the Supreme Court of Vermont noted, in *Dixon v. Parmelee*,[22] the privilege allowed the attorney to better conduct his cause.[23] Modern

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to the attorney–client privilege, and it has become the primary measure of the limits of the privilege. *See* Norman W. Spaulding, *Compliance, Creative Deviance, and Resistance to Law: A Theory of the Attorney–Client Privilege*, 2013 J. PROF. LAW. 135, 138–39 (outlining the expansion of the crime-fraud exception throughout the end of the twentieth century).

17. *See* FED. R. EVID. 502 (outlining the circumstances under which the attorney–client privilege may be waived).

18. *See id.* (providing inadvertent disclosure of privileged information does constitute a waiver of the attorney–client privilege if "the holder of the privilege . . . took reasonable steps to prevent disclosure[] and . . . rectify the error"); EVID. 503 (stating a person upon whom the Texas Rules of Evidence confer a privilege waives the privilege if the person voluntarily discloses or consents to disclosure of the privileged information).

19. *See* Strong v. State, 773 S.W.2d 543, 547 (Tex. Crim. App. 1989) (recognizing the importance of the attorney–client privilege as an exclusionary rule of evidence, though the privilege is not a principle derived from the Constitution). As one commentator notes, the "attorney–client privilege is the product of judicial decisions," which have been codified in statutes. Hazard, *supra* note 9, at 1064.

20. *See* Spaulding, *supra* note 16, at 137 (noting, from its earliest roots in the English common law, "the privilege recognized a point of gentlemanly honor" and the unseemliness of forcing a lawyer to betray a client's confidence); *see also* Hazard, *supra* note 9, at 1069 (stating the privilege between attorney and client is clearly grounded from the late 1700s).

21. *See The Attorney–Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464, 467 (1977) [hereinafter *Attorney–Client Privilege: Fixed Rules*] (explaining the modern law on privilege is still consistent with the utilitarian theory).

22. Dixon v. Parmelee, 2 Vt. 185 (1829).

23. *See id.* at 188 ("It is the privilege of the client, that the mouth of his counsel should be forever sealed against the disclosure of things necessarily communicated to him for the better conducting his cause."); *see also Confidential Communications Between Client and Attorney*, 5 ALB. L.J., Jan. 6, 1872, at 1, 2 ("The more nearly he succeeds in possessing himself of the secrets of his client's

policy focuses on the needs of the justice system to produce just results.[24] The modern justification is utilitarian because for the attorney to advocate effectively, there must be confidence and trust between the attorney and the client.[25] There are three assumptions regarding the attorney–client privilege:

> First, it assumes that a client will communicate with counsel more fully and truthfully if attorney–client communications are protected from disclosure. Second, it assumes that an attorney can advise her client more effectively if the client is more forthcoming. Finally, it assumes that the value of the resulting improved legal representation exceeds the cost of undisclosed evidence.[26]

Thus, there is an implied tradeoff between effective representation and disclosure of all the pertinent facts of a case.[27]

It is critical the client can trust the attorney and be sure the attorney is

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mind, motives, and thoughts, the better he can do justice not only to the client himself, but to the court and the community . . . .").

24. *See* Davis, *supra* note 9, at 170 (finding, while the justifications behind the attorney–client privilege are many, the general consensus seems to be that the privacy and professionalism required by the attorney–client privilege are "vital to our system of justice"); *see also* Steven Bradford, *Conflict of Laws and the Attorney–Client Privilege: A Territorial Solution*, 52 U. PITT. L. REV. 909, 914 (1991) (discussing the replacement of the English justification for the attorney–client privilege with the modern utilitarian argument that supports it today).

25. *See* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) ("The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client."); United States v. Levy, 577 F.2d 200, 209 (3d Cir. 1978) (explaining for our adversary system to function properly, any advice a client receives from her lawyer should be insulated from discovery by the government); Ovalle v. State, No. 13-12-00272-CR, 2014 WL 69545, at *6 (Tex. App.—Corpus Christi Jan. 9, 2014, pet. ref'd) (mem. op.) (contending interference by a state agent into the attorney–client relationship chills and diminishes the discussion between attorney and client); Woodruff v. State, 330 S.W.3d 709, 724 (Tex. App.—Texarkana 2010, pet. ref'd) (holding free two-way communication between attorney and client is necessary if counsel is to be effective and is linked to the accuracy and integrity of fact finding); *see also* Ruzenski, *supra* note 9, at 471–72 (commenting the attorney–client privilege "is a necessary building block in ensuring that justice is served" because lawyers can only render proper and effective legal assistance when they are made aware of all of the facts).

26. *See* Bradford, *supra* note 24, at 914 (outlining the assumptions that are said to justify and explain the modern rationale behind the attorney–client privilege).

27. *See id.* at 914 ("The privilege limits the available relevant evidence, seriously impeding the search for truth, but it does so in pursuit of what is perceived to be a higher value." (footnote omitted)); Davis, *supra* note 9, at 173 (acknowledging the scope of the privilege creates a conflict with the concepts of promoting disclosure and searching for truth in judicial proceedings); Ruzenski, *supra* note 9, at 473 (stating that the attorney–client privilege "is interpreted narrowly because it inhibits the truth seeking process"); *see also Attorney–Client Privilege: Fixed Rules*, *supra* note 21, at 478–79 (stating only in extreme situations when the values undercutting the privilege clearly outweigh the justification for it, should courts rely on the exceptions to the attorney–client privilege).

the client's agent and not an agent of the state or of the law.[28] The attorney–client relationship must consist of genuine fidelity so greater candor may flow from it.[29] If the attorney–client relationship is intruded upon by law enforcement or prosecutors without just cause, the confidence in the privilege and the candor between an attorney and his or her client will be severely diminished.

V. THE LAWYER'S ETHICAL DUTY OF CONFIDENTIALITY

Distinct from the evidentiary attorney–client privilege is the lawyer's duty of confidentiality.[30] Some scholars believe the two concepts should be harmonized, thus, strengthening the privilege.[31] The ethical duty is distinct from the evidentiary privilege, as it is a duty developed by lawyers and the American Bar Association (ABA) and imposes upon an attorney an obligation to maintain confidentiality in all matters of representation.[32]

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28. *See* Spaulding, *supra* note 16, at 162 (forwarding the primary incentive of the attorney–client privilege is the need for the client to be able to trust the attorney and be assured the attorney is not an agent of the state, the law, the court, or the client's adversaries).

29. *See id.* (conditioning a successful attorney–client relationship on the existence of genuine fidelity between lawyer and client).

30. The attorney–client privilege and the ethical duty of confidentiality are two similar but distinct concepts. While both are communications privileges, one is an evidentiary privilege and the other extends beyond termination of the representation. *See* Fred C. Zacharias, *Harmonizing Privilege and Confidentiality*, 41 S. TEX. L. REV. 69, 72–75 (1999) (noting the importance of differentiating between the evidentiary nature of the attorney–client privilege and the ethical duty of a lawyer to safeguard client confidences). The Supreme Court recognizes a duty of loyalty as one of the essential components of reasonable performance by defense counsel. *See* Strickland v. Washington, 466 U.S. 668, 688 (1984) (proclaiming defense counsel owes to the client a duty of loyalty because it is counsel's function to assist the client); *see also* Edward J. Imwinkelried, *The Dangerous Trend Blurring the Distinction Between a Reasonable Expectation of Confidentiality in Privilege Law and a Reasonable Expectation of Privacy in Fourth Amendment Jurisprudence*, 57 LOY. L. REV. 1, 26 (2011) (asserting "[i]f the courts were to lose sight of [the] distinction" between the ethical confidentiality privilege and the attorney–client privilege, "the consequences could be a significant expansion of the obstructive impact of privileges on the search for truth in litigation"); Mosteller, *supra* note 5, at 991–92 (discussing the duty of loyalty recognized in *Strickland* and concluding, within that duty, the duty of confidentiality promulgated by the ABA is widely recognized).

31. *See* Zacharias, *supra* note 30, at 89 (stating legislatures could refine the privilege rules so they subsume the appropriate limits of secrecy instead of maintaining two separate rules with different definitions that are enforced by separate bodies). *But see* Jean Fleming Powers, *Going Too Far to Achieve Harmony*, 41 S. TEX. L. REV. 203, 203 (1999) (admitting the attorney–client privilege and the attorney's duty of confidentiality are often confused in application but noting, just because there is confusion between these two rules, consolidation of the two concepts is not necessarily the most appropriate remedy).

32. *See* MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 2013) (providing "a lawyer shall not reveal information relating to the representation of a client" subject to exceptions enumerated in the rule); *see also* Zacharias, *supra* note 30, at 72–73 (stating confidentiality became a duty promulgated by lawyer associations based on how client–lawyer relationships should function to

The duty of confidentiality was recently codified in the ABA Model Rules,[33] and the Supreme Court noted in *Stockton v. Ford*,[34] "There are few of the business relations of life involving a higher trust and confidence than that of attorney and client."[35] The Court further held it was the duty of the courts to protect important relationships, such as that of attorney and client, by seeing such relationships are not used to prejudice those bestowing them.[36]

In Texas, a codified duty of confidentiality appears in Rule 503 of the Texas Rules of Evidence under a special provision for criminal cases.[37] The relevant provision states: "In criminal cases, a client has a privilege to prevent the lawyer . . . from disclosing any other fact which came to the knowledge of the lawyer . . . by reason of the attorney–client relationship."[38] Correspondingly, a defense attorney has a duty to safeguard confidential client information and affirmatively act to protect such information when made aware of a possible intrusion by the state.[39] The Austin Lawyers Guild has filed its suit in compliance with, and pursuant to, the duty of a criminal defense attorney to maintain client confidence and loyalty.

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best serve the legal system). *But see* Dru Stevenson, *Against Confidentiality*, 48 U.C. DAVIS L. REV. 337, 344 (2014) ("On a more general level, lawyer confidentiality interferes with transparency in our society, including transparency in government officials, financial institutions, and other power structures that affect our daily lives."). A minority of legal scholars argue against the confidentiality rules and note the radical contrarian position of arguing for their abolishment and the unlikely acceptance of such a position. *See* Stevenson, *supra*, at 347 (commenting on the unpopularity of taking a stance against lawyer-client confidentiality rules).

33. The duty of confidentiality became more a product of legislation as legal ethics became codified as a result of the ABA's promulgating the ABA Model Rules of Professional Conduct in 1983. *See* Zacharias, *supra* note 30, at 72 (explaining the legislative nature of legal ethics and the duty of confidentiality follows from the ABA and other lawyer organizations attempt to develop rules based on a unique vision of what lawyers should be in the community).

34. Stockton v. Ford, 52 U.S. (11 How.) 232 (1850).

35. *Id.* at 247.

36. *See id.* (placing on the courts a duty to protect the attorney–client relationship). To invoke the protection of confidentiality privilege, all that one must prove is that one "had the required expectation of confidentiality at the very time of the communication." Imwinkelried, *supra* note 30, at 13. Thus, to determine whether or not a confidentiality privilege has attached, "the critical time is the time of the communication itself." *Id.* at 15.

37. *See* TEX. R. EVID. 503(b)(2) (providing a special rule of privilege in criminal cases).

38. *Id.*

39. *See* Nat'l Ass'n of Criminal Def. Lawyers Ethics Advisory Comm., Op. 02-01, at 17 (2002) (commenting a defense attorney "has a fundamental and affirmative duty to act to protect the confidence"). In deciding whether the duty of confidentiality has been breached, a court will interpret the duty more broadly than it would the attorney–client privilege because it applies in most contexts. Zacharias, *supra* note 30, at 73.

VI. PENDING LITIGATION AGAINST THE TRAVIS COUNTY SHERRIFF'S DEPARTMENT

A. *The Plaintiffs*

The Texas Civil Rights Project (TCRP) was established in 1990 by Oficina Legal del Pueblo Unido, Inc., a grassroots foundation aimed at providing legal services to low-income people and minorities.[40] The TCRP aims to "promote racial, social, and economic justice through litigation, education, and social services" for those who are "least able to defend themselves."[41] Through the Prisoners' Rights Program, the organization advances the rights of the incarcerated through litigation and advocacy that will have broad impact.[42]

The Austin Lawyers Guild is a local organization of attorneys, legal workers, law students, and activists whose goal is to solve local problems.[43] The organization seeks to keep those in the legal community engaged in activism efforts.[44] The Austin Lawyers Guild strives to unite the community and "create organizations that will fight over the long haul."[45]

B. *The Case*

On April 29, 2014, a group of Travis County defense attorneys filed a class action lawsuit alleging conversations between defense attorneys and their inmate–clients were being recorded by the Travis County Sheriff's Office and turned over to the prosecution.[46] Securus Technologies

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40. *Our History*, TEX. C.R. PROJECT, http://www.texascivilrightsproject.org/81/our-history (last visited May 12, 2016).

41. *Our Mission*, TEX. C.R. PROJECT, http://www.texascivilrightsproject.org/3170/our-mission (last visited May 12, 2016).

42. *See Prisoners' Rights*, TEX. C.R. PROJECT, http://www.texascivilrightsproject.org/programs-and-services/prisoners-rights (last visited May 12, 2016) (describing the Prisoners' Rights Program and its goal of improving conditions in Texas jails and prisons where over 200,000 people are incarcerated on a given day).

43. *About*, AUSTIN LAW. GUILD, http://austinlawyersguild.org/about (last visited May 12, 2016).

44. *Id.*

45. *Community Organizing*, AUSTIN LAW. GUILD, https://sites.google.com/site/austinlawyersguild/community-organizing (last visited May 12, 2016).

46. *See* Angela Morris, *Class Action Alleges Lawyers' Calls to Inmates Still Recorded, Visitation Option Impacts Income*, TEX. LAW. (July 31, 2014), http://www.texaslawyer.com/id=1202665374235/Class-Action-Alleges-Lawyers-Calls-to-Inmates-Still-Recorded-Visitation-Option-Impacts-Income?slreturn=20160324153502 (reporting on the allegations of violation of the attorney–client privilege against the Travis County Sherriff's Department); *see also* Martha Neil, *Recorded Jail Phone Calls Violate 6th Amendment and Cost Us Money, Attorneys Say in Lawsuit*, ABA J. (Aug. 1, 2014,

provides the recording services for Travis County and claims conversations between attorneys and clients are completely private.[47] The plaintiff's attorney, Brian McGiverin of the Texas Civil Rights Project, has said it is "too soon to know how many calls have been recorded."[48] The group of defense attorneys says it became aware of the situation because some prosecutors have actually turned over recordings.[49] Additionally, it notes prosecutors have used information gleaned from the recordings to their advantage during litigation.[50] McGiverin also told an NBC affiliate: "In terms of existing convictions that may have been secured with prosecutors' unlawful use of these recordings, that does open a big can of worms."[51] The plaintiffs also state, "Criminal defense lawyers in early 2013 contacted policymakers with evidence, . . . but the defendants 'did nothing to fix it.'"[52] Leading criminal defense attorneys had proposed that judges sign protective orders to prevent the alleged conduct from happening in the future, but judges wanted the prosecuting attorneys "to be on board with the solution."[53] Becoming frustrated with the lack of progress, the plaintiffs felt they had no choice but to proceed with a

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11:25 AM), http://www.abajournal.com/news/article/recorded_jail_phone_calls_violate_6th_amendment_and_cost_us_money_attorneys ("Joining colleagues in Florida, Minnesota, New York, Pennsylvania and Tennessee who have complained that jailed defendants' phone calls with their attorneys are being recorded, some Texas lawyers have filed an amended class action complaint objecting to the practice.").

47. *See Lawyers Want Court to Stop Texas Jail from Recording Calls with Inmates*, THOMSON REUTERS, http://blog.thomsonreuters.com/index.php/lawyers-want-court-to-stop-texas-jail-from-recording-talks-with-inmates (last visited May 12, 2016) (reporting on the claims alleged against Securus Technologies and the company's assertions that conversations between legal counsel and inmates are completely private).

48. *See Lawsuit Filed over Recorded Calls at Travis County Jail*, MY FOX AUSTIN (on file with the *St. Mary's Law Journal*) (saying it is too soon to tell how many calls were recorded and the plaintiffs seek injunctive relief to prevent the practice from reoccurring).

49. *See* Morris, *supra* note 46 (stating prosecutors have handed over confidential recordings and defense lawyers have proof of the alleged misconduct).

50. *See* Jeremy Heallen, *Texas Prosecutors Accused of Spying on Defense Attys*, LAW 360, http://www.law360.com/articles/533371/texas-prosecutors-accused-of-spying-on-defense-attys (last visited May 12, 2016) (outlining allegations of prosecution gaining an unfair, tactical advantage by listening to recordings of privileged information); *see also* Neil, *supra* note 46 (discussing the plaintiffs amended complaint).

51. David Lee, *Calls Recorded for Prosecutions, Lawyers Say*, COURTHOUSE NEWS SERV. (Apr. 30, 2014, 4:54 PM), http://www.courthousenews.com/2014/04/30/67462.htm.

52. Morris, *supra* note 46 (reporting on plaintiffs' requests to prosecutors and state officials to desist from listening to attorney–client phone calls).

53. *Id.* Some scholars believe going to the trial judge is an effective means of curbing prosecutorial misconduct because the trial judge often does not publicly identify the offending prosecutor and because state judges stand for election. Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 66.

lawsuit.[54] The goal of the litigation is to protect the right to speak privately with an attorney, which is -arguably one of the most cherished rights in the legal system.[55] Lawyers for the plaintiffs have stated that the scope of the lawsuit is not yet clear, as it encompasses some very important issues.[56]

VII. IMPLICATIONS ON ATTORNEY–CLIENT PRIVILEGE

A. *The Federal Wiretap Act*

Congress's intent regarding the Federal Wiretap Act was to balance the legitimate needs of law enforcement in conducting investigations with the privacy interests of the citizens.[57] Federal and state courts issue hundreds of electronic surveillance orders each year, and intrusion into privileged communications is a problem in each case because while 18 U.S.C. § 2510 does not allow intercepted privileged information to be admitted into evidence, it does not prohibit the interception of such privileged communication.[58] It is firmly established that the Federal Wiretap Act applies in a prison or detention center and inmates are entitled to notice if their calls are being recorded.[59] Accordingly, information obtained deceptively and without notice should not be admitted into evidence[60] or

54. *See* Morris, *supra* note 46 ("It's gone on long enough. We decided it was absolutely necessary to pursue this litigation.").

55. *See* Angie Beavin, *Lawsuit Accuses Travis County Jail of Recording Calls with Attorneys*, KXAN (Apr. 29, 2014, 2:48 PM), http://kxan.com/2014/04/29/lawsuit-accuses-travis-county-jail-of-recording-calls-with-attorneys (speaking to Austin news station KXAN, McGiverin advocated the importance of the attorney–client privilege and the need for private communication between attorney and client).

56. *Id.*

57. *See* Michael Goldsmith & Kathryn Ogden Balmforth, *The Electronic Surveillance of Privileged Communications: A Conflict in Doctrines*, 64 S. CAL. L. REV. 903, 904 (1991) ("In shaping Title III, Congress sought to balance two vital competing interests: the legitimate needs of law enforcement and the privacy concerns of the citizenry.").

58. *See id.* at 909 (noting 18 U.S.C. § 2510 does not allow law enforcement to use privileged information that has been intercepted as evidence in a criminal case, however, the mere fact that pertinent privileged information is being intercepted presents serious privacy issues).

59. Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510–2520 (2012); *see* Adams v. City of Battle Creek, 250 F.3d 980, 984–85 (6th Cir. 2001) (holding even prisoners are entitled to some notice that their calls are being monitored by the facility or another agency); United States v. Van Poyck, 77 F.3d 285, 290 (9th Cir. 1996) (affirming the lower court's finding that monitoring detainee's phone call did not amount to a constitutional violation because the detainee consented to having calls monitored); United States v. Amen, 831 F.2d 373, 378 (2d Cir. 1987) (stating 18 U.S.C. § 2510 clearly applies to prison monitoring).

60. *See generally* Davis, *supra* note 9, at 182 (analyzing a Bureau of Prisons Regulation that allows the attorney general to obtain wiretapped information upon proper notice and probable cause and

used improperly to gain any unfair advantage.

B. *The Texas Wiretap Act*

The Texas Wiretap Act provides that a party to a communication may sue a person who intercepts or attempts to intercept the communication, employs another to do the same; or who uses or divulges information that the person knows or should know was obtained by interception of the communication.[61] The statute further imposes liability on common carriers, landlords, and building operators who aid or permit the interception of a communication.[62] The section creating a cause of action does not apply to communications intercepted pursuant to 18 U.S.C. § 2516.[63] The alleged actions of the Travis County Sheriff's Office and Securus Technologies were not in compliance with federal or state wiretap laws, as detainees were led to believe that their conversations with defense counsel were private and no notice was given that conversations were recorded.

C. *The Fourth Amendment*

In their complaint, the Austin Lawyers Guild alleged that the defendants violated the Fourth Amendment.[64] The Fourth Amendment provides

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concluding courts would exclude evidence when prison officials deceptively induced a prisoner to believe that conversations were not being monitored); Ruzenski, *supra* note 9, at 479 (evaluating a Bureau of Prisons Regulation that allows wiretapping of attorney–client telephone calls if there is reasonable suspicion that the detainee is using the attorney to facilitate terrorism and noting that written notice must be given to the detainee and the attorney before any monitoring is to occur).

61. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 123.002(a) (West 2006) (providing a cause of action for violation of the Texas Wiretap Act). A "wire communication" is "an aural transfer made in whole or in part through the use of facilities for transmission of communication through wire, cable, or other connection between the point of origin and the point of reception." TEX. CRIM. PROC. CODE ANN. art. 18.20, § 1 (West 2006). To "intercept" a wire communication is to acquire the contents of a wire communication through the use of a device. *See* CIV. PRAC. & REM. § 123.001 (defining "communication" and "interception" for purposes of establishing the cause of action).

62. CIV. PRAC. & REM. § 123.002(a)(3).

63. *Id.* § 123.002(b); *see* 18 U.S.C. § 2516 (2012) (providing that communications may be intercepted after proper application to a federal judge). Despite regulations on wiretapping, enforcement agencies often do not exercise their power with restraint and side step or ignore regulations. *See* DAVID FELLMAN, THE DEFENDANT'S RIGHTS TODAY 291 (1976) (noting the ineffectiveness of wiretap regulations and recognizing that while wiretaps may help catch criminals, so would listening in on confessions given to priests, rifling through mail, and searching private homes without restriction—all illegal practices).

64. *See* U.S. CONST. amend. IV (providing that the people are to be free from unreasonable searches and seizures); *see also* Heallen, *supra* note 50 ("In addition to violating wiretap laws, the ALG says that the constitutional rights of criminal defendants are being impaired by the sharing of intercepted attorney–client communications.").

privacy interests more broadly than the Sixth Amendment, and some have argued it should apply to attorney–client communications.[65] This is true because an inmate who is incarcerated has surely been seized for purposes of the Fourth Amendment, and eavesdropping on communications has long been recognized as a "search" for Fourth Amendment purposes.[66] The Supreme Court said, "It is obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room."[67] However, the Court has noted that even in a jail, the relationships that the law has protected and afforded particularized confidentiality must continue to receive unceasing protection.[68] In his concurring opinion in *Katz v. United States*,[69] Justice Harlan outlined the test for applicability of the Fourth Amendment as follows: "First that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[70] The controlling questions are whether inmates have a reasonable expectation of privacy when communicating with their attorneys[71] and whether society is prepared to recognize the inmate's

65. *See* Akhil Reed Amar & Vikram David Amar, *The New Regulation Allowing Federal Agents to Monitor Attorney–Client Conversations: Why It Threatens Fourth Amendment Values*, 34 CONN. L. REV. 1163, 1164 (2002) (advocating the Fourth Amendment should extend to protect inmates from unlawful intrusion into the attorney–client privilege); *see also* Eric D. McArthur, Comment, *The Search and Seizure of Privileged Attorney–Client Communications*, 72 U. CHI. L. REV. 729, 730 (2005) (stating, because of the important private interests embedded in the attorney–client privilege, it is unreasonable for law enforcement to seize communications from inmates, as they are within the scope of the Fourth Amendment).

66. Amar & Amar, *supra* note 65, at 1164. Wiretapping is in fact, more intrusive than the authorized search for tangible items because the subject of the wiretap is usually unaware of any intrusion. *See* FELLMAN, *supra* note 63, at 291 (noting wiretaps are more intrusive upon a defendant's rights than are searches for tangible items because of the subject's usual unawareness of the intrusion).

67. Lanza v. New York, 370 U.S. 139, 143 (1962).

68. *Id.* at 144. *But see id.* (recognizing the petitioner did not claim violation of special relationship, such as that of the attorney and client, and thus the case did not involve information that was considered privileged).

69. Katz v. United States, 389 U.S. 347 (1967). Prior to the Supreme Court's decision in *Katz*, Fourth Amendment analysis was based on property law principles. *See* Imwinkelried, *supra* note 30, at 3 (commenting on Fourth Amendment analysis prior to the Supreme Court's decision in *Katz*).

70. *Katz*, 389 U.S. at 361 (Harlan J., concurring). While the majority opinion held that "the Fourth Amendment protects people and not places," Justice Harlan's concurring opinion has proved to be the more influential pronouncement. *See* Imwinkelried, *supra* note 30, at 3–4 (proclaiming the test set out in Justice Harlan's concurring opinion has been the more influential and quoted pronouncement).

71. Davis, *supra* note 9, at 182 (recognizing "not all conversations within the confines of a prison are without a reasonable expectation of privacy" such as when prison officials induce defendants to believe that certain communications are confidential). For purposes of Fourth

expectation as reasonable.[72] Given the importance of the attorney–client relationship to society, especially in the criminal justice system, it is certainly reasonable for a criminal defendant to expect his conversations with his attorney will remain private. A detainee's telephone communications should be especially protected when calls are made to a lawyer, a bail bondsman, or to any other person who will aid the inmate in preparing for trial.[73]

D. *The Fifth Amendment*

"No person shall be . . . deprived of life, liberty, or property, without due process of law."[74] It is well established that inmates have a right of access to the courts, which is derived from the due process guarantees provided by the Fifth Amendment to the Constitution.[75] Prisons shall provide access to the courts by establishing an adequate law library or by allowing adequate assistance from those trained in the law.[76]

Bell v. Wolfish[77] contemplates that under the Due Process Clause, a detainee could not be punished before having been adjudicated as guilty.[78] To constitute punishment, a governmental action must (1) cause the detainee to suffer some harm or "disability," and (2) the purpose of the

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Amendment analysis, the defendant must have had a subjective belief that the communication was made in private. *See* Imwinkelried, *supra* note 30, at 16 (opining the requisite state of mind for Fourth Amendment analysis as being a simple, subjective, belief that the potentially protected evidence was free from public gaze).

72. Imwinkelried, *supra* note 30, at 21 (asserting even when the claimant possessed the requisite subjective belief that the communication was private, a judge must decide whether the privacy is accepted from a broad, societal perspective); Teri Dobbins, *Protecting the Unpopular from the Unreasonable: Warrantless Monitoring of Attorney Client Communications in Federal Prisons*, 53 CATH. U. L. REV. 295, 337 (2004) ("Because inmates have a reasonable expectation of privacy in their communications with their attorneys, and because society is prepared to recognize that expectation as reasonable, the Fourth Amendment protects the communications from unreasonable searches and seizures.").

73. *See* Inmates of Allegheny Cty. Jail v. Wecht, 565 F. Supp. 1278, 1284 (W.D. Pa. 1983) ("As stated in our first opinion, an inmate's right to phone calls is to be protected, especially if the call is to a lawyer, bail bondsman or other party who will aid the inmate for preparing for his trial.").

74. U.S. CONST. amend. V.

75. Brewer v. Wilkinson, 3 F.3d 816, 820 (5th Cir. 1993).

76. Georgetown Law Journal Association, *Substantive Rights Retained by Prisoners*, 32 ANN. REV. CRIM. PRO. 887, 887 & n.2744 (2003).

77. Bell v. Wolfish, 441 U.S. 520 (1979).

78. *See id.* at 535 (holding it was inconsistent with due process to punish pretrial detainees in the same manner as those who have already been found guilty); *see also* Davidson, *supra* note 4, at 11 (outlining the due process test for pretrial detainees and noting that the punishment inquiry turns on the state's intent).

governmental action must be to punish the detainee.[79] Recording a pretrial detainee's telephone communications with his attorney and allowing the recordings to enter the hands of the prosecution would surely cause a harm or disability because it deprives the detainee of a fair trial. The potential use of privileged information would constitute a punishment, as the defendant would have never received a fighting chance. Such actions clearly violate a detainee's due process guarantees.

E. *The Sixth Amendment*

The Sixth Amendment to the United States Constitution guarantees the right to counsel.[80] Implicit in the right to counsel is the right to receive *effective*[81] assistance of counsel.[82] Discussing its decision in *Gideon v. Wainwright*,[83] the Supreme Court reiterated that defendants have the right to the guiding hand of counsel throughout every step in the proceedings.[84]

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79. *Bell*, 441 U.S. at 538.

80. U.S. CONST. amend. VI. The right to be represented by an attorney is one of the most important constitutional rights to a criminal defendant for the obvious reason that most laymen know little about the law and legal procedure. Without the assistance of counsel, most criminal defendants are unlikely to have an adequate defense. FELLMAN, *supra* note 63, at 208; *see* Davis, *supra* note 9, at 183 (contending one important rationale behind the right to counsel is ensuring the defendant receives a fair trial). Legal scholars also find authority to support the position that the premise behind the attorney–client privilege is grounded in the Sixth Amendment to the U.S. Constitution. Ruzenski, *supra* note 9, at 471.

81. To prove that counsel's performance was ineffective, a showing must be made that (1) counsel's performance fell below an objective standard of reasonableness and that (2) counsel's deficient performance prejudiced the client in some way. *See* Strickland v. Washington, 466 U.S. 668, 687–88 (1984) (holding counsel's errors were so serious that the defendant did not receive a fair trial as prescribed by the Sixth Amendment); Davis, *supra* note 9, at 183 (discussing the two-prong test announced in *Strickland*).

82. *See* McMann v. Richardson, 397 U.S. 759, 771 (1970) (stating if the Sixth Amendment right to counsel is to serve its purpose, defendants cannot be left at the mercy of incompetent counsel and "judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases"); United States v. Levy, 577 F.2d 200, 209 (3d Cir. 1978) (noting if the professional assistance provided by the Sixth Amendment is to be meaningful, there must be free two-way communication between attorney and client). To provide the best and most effective legal advice, clients must feel they can make full disclosures to their defense attorneys. *See* Ruzenski, *supra* note 9, at 472 (citing Upjohn v. United States, 449 U.S. 383, 389 (1981)).

83. Gideon v. Wainwright, 372 U.S. 335 (1963). Prior to this case, the right to counsel applied only in capital cases. Gideon's request for appointed counsel was denied and he defended himself against a breaking and entering charge, which resulted in a conviction of five years. *See id.* at 337 ("Put to trial before a jury, Gideon conducted his defense about as well as could be expected from a layman."); FELLMAN, *supra* note 63, at 215 (discussing the Supreme Court's decision in *Gideon* and its recognition of the right to counsel as a fundamental right in our adversary system, especially for those too poor to hire a lawyer).

84. *See* Polk Cty. v. Dodson, 454 U.S. 312, 322 (1981) (emphasizing state criminal defendants have the right to be assisted by counsel at every step during the proceedings that have been instituted

The Court further noted that implicit in the defense attorney's duty to advocate effectively was the assumption that counsel would be free from state control.[85] Surely, an inmate cannot receive adequate assistance of counsel when counsel cannot do his job effectively because of state interference. The National Association of Criminal Defense Lawyers (NACDL) strongly asserts wiretapping and listening to attorney and client telephone communications amounts to state control.[86]

Further, the Supreme Court has held that the prosecution and the police have an affirmative duty not to circumvent or dilute the accused's right to counsel.[87] In *Weatherford v. Bursey*[88] the Supreme Court used the following analysis to determine whether a violation of the Sixth Amendment had occurred: (1) whether the monitor's identity had been revealed; (2) the purpose of the monitoring; (3) whether the information was revealed to

against them); FELLMAN, *supra* note 63, at 219 (recognizing general agreement that effective representation means that a defendant is entitled to the assistance of a lawyer at every step in the proceedings).

85. *See Dodson*, 454 U.S. at 322 (acknowledging for defense counsel to effectively guide and advise defendants, they must be free from state interference).

86. Nat'l Ass'n of Criminal Defense Lawyers Ethics Advisory Comm., Op. 02-01, at 16–17 (2002) (emphasizing wiretapping and eavesdropping on attorney and client communications amounts to state control).

87. *See* Maine v. Moulton, 474 U.S. 159, 171 (1985) (writing for the majority, Justice Brenan clarifies that the state and the prosecution have an affirmative duty not to act in a manner that functions to circumvent or dilute a defendant's Sixth Amendment right to counsel). The right to counsel can hardly be effective if government agents or the prosecution intrude upon the relationship between attorney and client through eavesdropping or wiretapping. *See* JOHN JAY DOUGLASS, ETHICAL ISSUES IN PROSECUTION 171 (1988) (reiterating intrusive acts dilute the attorney–client relationship and the effective representation of counsel); Davis, *supra* note 9, at 173 ("Many courts have stated that this mandate is so important, that it requires strict application of the rule resulting in little or no intrusion into the attorney-client relationship."); Mosteller, *supra* note 5, at 994 (stating purposeful government intrusion into the confidential attorney–client relationship or acquisition of information resulting from the confidential relationship is essential to finding a violation recognized as constitutionally protected).

88. Weatherford v. Bursey, 429 U.S. 545 (1977). In *Weatherford*, the Supreme Court found no constitutional violation where an informant acting as a codefendant met with the defendant and counsel and discussed the case. *Id.* at 556–57. A significant factor in the decision was the fact that the informant did not share any information regarding the meeting or the defendant's trial strategy with police or the prosecution. Mosteller, *supra* note 5, at 994–95; *see* Bishop v. Rose, 701 F.2d 1150, 1156–57 (6th Cir. 1983) (stating there was a Sixth Amendment violation when the prosecution seized from the defendant's jail cell a document prepared by the defendant at the request of his lawyer detailing the defendant's involvement in the charged offense and used the document against the defendant on cross examination); United States v. Levy, 577 F.2d 200, 210 (3d Cir. 1978) (dismissing the original indictment because the Sixth Amendment was violated when the prosecution obtained information from an informant, who was a co-defendant and concurrent client of defense counsel, regarding the joint-trial strategy).

prosecutors;[89] and (4) whether the defendant could show actual prejudice in the preparation of or during the actual trial.[90]

Another consideration when conversations with counsel are overheard is when the eavesdropping has produced, directly or indirectly, any evidence offered at trial.[91] Detainees whose telephone calls have been illegally recorded could meet this standard, as prosecutors are allegedly receiving the illegally obtained information and using it indirectly to secure a conviction.

If detainees become aware of the monitoring of attorney–client telephone calls, the consequences would produce a chilling effect on the attorney–client privilege and on the right to effective assistance of counsel. In essence, the monitoring would amount to a restriction, which would impede access to an inmate's attorney.[92]

89. The Tenth Circuit has ruled that when the intrusion is intentional and the confidential information has been secured by the prosecution without justification, prejudice is presumed. Shillinger v. Haworth, 70 F.3d 1132, 1142 (10th Cir. 1995). The Tenth Circuit's presumption of prejudice goes somewhat further than other courts. *Compare* Mosteller, *supra* note 5, at 998–99 (discussing *Haworth* and the court's focus on whether the invasion was purposeful and groundless), *with* State v. Lenarz, 22 A.3d 536, 542 (Conn. 2011) (concluding prejudice may be presumed when the prosecutor has received and read privileged attorney–client information regardless of whether the intrusion of the attorney–client relationship was intentional).

90. *See Weatherford*, 429 U.S. at 554 (holding "prejudice" in a criminal case is established by proving that information gleaned from an intrusion into the attorney–client relationship was used by the prosecution either directly or indirectly, to the substantial detriment to the defendant); Davis, *supra* note 9, at 183 (outlining to prove prejudice, a defendant must show there was an improper intrusion on the attorney–client relationship, the prosecution used information gained from the intrusion against the defendant (directly or indirectly), to infuse information regarding the accused's defense, and the information used was a substantial detriment to the defendant).

91. *See Weatherford*, 429 U.S. at 554. (1977) ("Had Weatherford testified at Bursey's trial as to the conversation between Bursey and Wise; had any of the State's evidence originated in these conversations; had those overheard conversations been used in any other way to the substantial detriment of Bursey; or even had the prosecution learned from Weatherford, an undercover agent, the details of the Bursey-Wise conversations about trial preparations, Bursey would have a much stronger case.").

92. *See* Murphy v. Walker, 51 F.3d 714, 718 (7th Cir. 1995) (holding a pretrial detainee's assertion that his telephone privileges were revoked and impeded his access to an attorney would amount to a Sixth Amendment violation); *see also* Jaramillo v. Bexar Cty., No. SA-09-CV-0656 XR (NN), 2011 WL 1655892, at *1 (W.D. Tex. May 2, 2011) (recognizing "courts have not always been clear about the substantive rights implicated" by attorney–client communication, but there exists authority that would indicate that limiting pretrial detainees access to an attorney by telephone would amount to a violation of the Constitution).

VIII. WHAT RIGHTS DO PRISON INMATES HAVE?

Prison walls do not isolate inmates from the protection of the Constitution.[93] The Supreme Court held, in *Hudson v. Palmer*,[94] that inmates do not have a reasonable expectation of privacy when they are in their cells.[95] The Court balanced the need for prison security and protection from illegal activity and contraband against the expectation of privacy, stating it would be impossible to accomplish important prison objectives if inmates were allowed the right to privacy in their cells.[96] The sensitive nature of the information exchanged between an attorney and an incarcerated client, however, would support a reasonable expectation of privacy.[97] In *Wolff v. McDonnell*,[98] the Supreme Court upheld a Nebraska prison regulation that allowed prison officials to open, but not read, mail from attorneys in a prisoner's presence to inspect for contraband because such a regulation would not impose upon an inmate's constitutional rights.[99] Thus, criminal defendants have the right to communicate *privately* with their attorney; though, the right is not absolute.[100]

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93. *See* Turner v. Safley, 482 U.S. 78, 84 (1987) (noting prisoners retain certain fundamental guarantees while incarcerated and when a prison regulation offends a fundamental guarantee, federal courts shall discharge their duties to protect fundamental rights); *see also* Hudson v. Palmer, 468 U.S. 517, 523 (1984) ("We have repeatedly held that prisons are not beyond the reach of the Constitution. No 'iron curtain' separates one from the other.").

94. Hudson v. Palmer, 468 U.S. 517 (1984).

95. *See id.* at 525–26 (notwithstanding caution in approaching claims regarding the Fourth Amendment's applicability, the Supreme Court holds society is not prepared to recognize an inmate's right to privacy while in his or her prison cell); Pollard v. State, 392 S.W.3d 785, 796 (Tex.— App. Waco 2012, no pet) (holding a defendant did not have an expectation of privacy in DNA left on a cup and spoon the defendant was using while in a detoxifying cell in a prison); *see also* Dobbins, *supra* note 72, at 331 (stating it is clear inmates are not afforded all of their rights to privacy under the Fourth Amendment while they are incarcerated).

96. *See Hudson*, 468 U.S. at 527 ("The two interests here are the interest of society in the security of its penal institutions and the interest of the prisoner in privacy within his cell. The latter interest, of course, is already limited by the exigencies of the circumstances: A prison shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room."); *Pollard*, 392 S.W.3d at 797 (finding DNA collection from prisoners reasonable in light of their diminished privacy rights, the minimal intrusion involved, and the legitimate government interest in the use of DNA to assist in solving crime).

97. *See* Dobbins, *supra* note 72, at 338 (advocating the sensitive nature of the communication between attorney and client makes recognition of the right to privacy in speaking with an attorney reasonable even though the client is incarcerated).

98. Wolff v. McDonnell, 418 U.S. 539 (1974).

99. *See id.* at 577 (concluding the act of opening mail designated as attorney–client communication in the presence of an inmate does not have a chilling effect on the privilege because prison officials cannot read the communication).

100. *See* Woodruff v. State, 330 S.W.3d 709, 724 (Tex. App.—Texarkana 2010, pet. ref'd) (acknowledging, while it is not an absolute and unqualified right, a defendant in a criminal case

A. *Pretrial Detainees*

Pretrial detainees are individuals who have been arrested, not yet been adjudicated, and remain incarcerated because they do not qualify for pretrial release.[101] Even though they have not been convicted of any crime, pretrial detainees have limited constitutional rights, and it is clear that they possess, at least, those rights that convicted prisoners enjoy.[102]

IX. HOW THE COURT SHOULD RULE IN *AUSTIN LAWYERS GUILD V. SECURUS TECHNOLOGIES, INC.*

The issue of jailhouse monitoring of inmates' telephone calls has long plagued criminal defense attorneys and has been discussed by the NACDL.[103] Specifically, the NACDL has concluded that a criminal defense attorney has an ethical duty to take affirmative action to protect privileged information from being intercepted by the government.[104]

In a recent case, *Nordstrom v. Ryan*,[105] the Ninth Circuit dealt with similar issues. An inmate challenged an Arizona Department of Corrections policy that allowed prison officials to scan, *and even read*, legal mail to ensure it was not contraband and was legal subject matter.[106] The Ninth Circuit concluded Nordstrom's allegations amounted to a Sixth Amendment claim, and if he been challenging his conviction based on "an intrusion into the attorney[–]client relationship," then a reversal of the conviction would have been required.[107] However, Nordstrom presented a constitutional rights claim—as does the Austin Lawyers Guild—in which he sought injunctive relief and was able to demonstrate he was realistically

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generally has the right to consult with an attorney privately).

101. *See* Bell v. Wolfish, 441 U.S. 520, 523 (1979) (examining the rights of pretrial detainees).

102. *See id.* at 545–46 (stating pretrial inmates have at least the same constitutional guarantees that convicted inmates possess); *see also* Ian Wood, Note, *An Unreasonable Online Search: How a Sheriff's Webcams Strengthened Fourth Amendment Privacy Rights of Pretrial Detainees*, 35 GOLDEN GATE U. L. REV. 1, 4 (2005) (describing the limited rights of pretrial detainees).

103. *See* Nat'l Ass'n of Criminal Defense Lawyers Ethics Advisory Comm., Op. 02-01, at 17 (2002) (discussing the duties owed to a client by a defense attorney after learning privileged telephone communications between the lawyer and the client have been monitored).

104. *See id.* (asserting a criminal defense attorney's duty to protect attorney–client communications form being discovered by the government is "an ethical and constitutional duty").

105. Nordstrom v. Ryan, 762 F.3d 903 (9th Cir. 2014).

106. *See id.* at 907 (detailing how Nordstrom advised a guard he had outgoing legal mail and the prison guard proceeded to read the entire contents of the letter against his objections).

107. *See id.* at 911 ("The harm Nordstrom alleges is not that tainted evidence was used against him but that his right to privately confer with counsel has been chilled. This is a plausible consequence of the intentional reading of his confidential legal mail.").

threatened by further repeated violations.[108] This case is analogous to the *Austin Lawyers Guild* case and should guide the court's ruling concerning the importance of upholding and protecting the attorney–client relationship.

X. WHAT REMEDIES WOULD BE AVAILABLE?

In *Turner v. Safley*,[109] the Supreme Court concluded, "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[110] Improper intrusions into the attorney–client relationship are not permissible regulations.[111]

Interference with a prisoner's right of access to the courts may constitute grounds for relief under the Federal Civil Rights Acts as well as through writs of habeas corpus.[112] Obtaining relief under 42 U.S.C. § 1983 is extremely difficult as prosecutors enjoy absolute immunity when acting in their capacity as an advocate.[113] A writ of habeas corpus, which is an original proceeding in federal court and a form of collateral attack on a state judgment, is also very difficult to obtain.[114] However, the plaintiffs

108. *See id.* (requiring a plaintiff to demonstrate a realistic threat of repeated injury exists by showing either (1) "the defendant had . . . a written policy, and that the injury 'stems from' that policy" or (2) "the harm is part of 'pattern of officially sanctioned . . . behavior, violative of the plaintiffs[] [federal] rights'" (2nd & 4th alteration in original) (quoting LaDuke v. Nelson, 762 F.2d 1318, 1324 (9th Cir. 1985))).

109. Turner v. Safley, 482 U.S. 78 (1987).

110. *Id.* at 89.

111. *See Nordstrom*, 762 F.3d at 910 (concluding a policy that allows officials to scan and read attorney–client communications is "highly likely" to infringe on an inmate's rights).

112. *See* Wolff v. McDonnell, 418 U.S. 539, 579 (1974) ("First, the demarcation line between civil rights actions and habeas petitions is not always clear. The Court has already recognized instances where the same constitutional rights might be redressed under either form of relief.").

113. Under the principal federal civil rights statute, prosecutors enjoy either absolute immunity or qualified immunity. *See* 42 U.S.C. § 1983 (2012) (creating civil liability for the deprivation of rights). When a prosecutor acts as advocate absolute immunity applies, even if the prosecutor has acted in bad faith. Imbler v. Pachtman, 424 U.S. 409, 422 (1976). Qualified immunity applies only when a prosecutor is acting as an investigator or an administrator. *See id.* at 420 (holding absolute immunity of a public official under the Civil Rights Act of 1871 defeats a suit at the outset so long as the prosecutor was acting within the scope of prosecutorial duties); Karen McDonald Henning, *The Failed Legacy of Absolute Immunity Under* Imbler*: Providing a Compromise Approach to Claims of Prosecutorial Misconduct*, 48 GONZ. L. REV. 219, 230 (2013) (outlining the functional test developed by the Supreme Court in *Imbler*, which determined whether prosecutorial immunity was absolute or qualified based on the nature of the conduct and the function the prosecutor was performing); Johns, *supra* note 53, at 53–54 (explaining the circumstances under which absolute and qualified immunity apply in 42 U.S.C. § 1983 actions).

114. *See* Johns, *supra* note 53, at 69 (opining writ of habeas corpus is an ineffective manner for obtaining relief from a conviction that was the result of prosecutorial misconduct mostly attributed

in *Austin Lawyers Guild* seek only declaratory and injunctive relief and simply ask the court to stop the Travis County Sheriff's Office and Securus Technologies from engaging in improper investigative conduct.

XII. ETHICAL IMPLICATIONS

While affording relief to those who have allegedly been wronged by the actions of the defendants is the issue of utmost importance, one must also consider what the ethical implications and repercussions are for prosecutors who have used the illegally obtained information.[115] Texas is one of forty-nine states that have fundamentally adopted the ABA Model Rules of Professional Conduct.[116] The respective comments to Rule 3.09 of the Texas Disciplinary Rule of Professional Conduct and Rule 3.8 of the ABA Model Rules outline the special duties of prosecutors[117] and recognize a duty to ensure justice is done and not simply a duty to be an advocate.[118] Additionally, the commentary to the Texas rule cautions that

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to the harmless error rule).

115. *See* Mosteller, *supra* note 5, at 962 (commenting on the derivative or indirect use of the "fruits' of the violation" of an evidentiary privilege and recognizing the Constitution, under certain circumstances, prohibits the derivative use of confidential communications). To put it broadly, "prosecutorial misconduct occurs whenever a conviction is pursued 'outside the bounds of acceptable advocacy'" and includes calculated transgressions as well as ignorance of applicable legal standards and court rules. *See* Lara A. Bazelon, *Hard Lessons: The Role of Law Schools in Addressing Prosecutorial Misconduct*, 16 BERKELEY J. CRIM. L. 391, 400 (2011) (outlining the general definition of prosecutorial misconduct (quoting Henning, *supra* note 4, at 720)).

116. *State Adoption of the ABA Model Rules of Professional Conduct*, ABA CENTER FOR PROF. RESP., http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited Apr. 24, 2016) (listing the states that have adopted the Model Rules and their initial dates of adoption).

117. The ABA Model Rules of Professional Conduct are the ethical rules that govern the legal profession. These rules single out prosecutors as the only lawyers who have a special duty beyond zealous representation of their clients. *See* MODEL RULES OF PROF'L CONDUCT r. 3.8 (AM. BAR ASS'N 2013). Disciplinary codes have always recognized that prosecutors should be treated differently from other lawyers. *See* Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1576 (reiterating disciplinary codes have always treated prosecutors differently from other lawyers and discussing the promulgation of special provisions for criminal prosecutors in the ABA Model Rules of Professional Conduct); Henning, *supra* note 4, at 727 (describing the special provisions and responsibilities promulgated by the ABA in the Model Rules of Professional Conduct that apply uniquely to prosecutors).

118. *See* TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 3.09 cmt. 1, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2013) (recognizing a prosecutor has a greater duty than that of an advocate and is entrusted with "the responsibility to see that justice is done"); *see also* MODEL RULES r. 3.8 cmt. 1 (stating "a prosecutor has the added responsibility of being a minister of justice and not simply an advocate"); Green, *supra* note 117, at 1588 (addressing the prosecutor's function as a minister of justice and noting a prosecutor has an affirmative duty to prevent the conviction of innocent people and to serve as a gatekeeper in the court system). Professor Green lists four reasons why prosecutors should be treated differently from other lawyers: (1) "prosecutors

a prosecutor "should not initiate or exploit any violation of a suspect's right to counsel."[119] Further, it explains, a "knowing disregard of the prosecutor's obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.04" under several different theories.[120] Under the ABA Model Rule, prosecutors also have an obligation to see that a defendant is afforded procedural justice.[121] ABA Model Rule 8.4 states misconduct occurs when a lawyer "engages in conduct involving dishonesty or engages in conduct that is prejudicial to the administration of justice."[122] The ABA has set forth standards that apply specifically to prosecutors and provide, "A prosecutor should not knowingly use illegal means to obtain evidence . . . or encourage others to use such means."[123] Despite promulgation of specific provisions by regulating authorities, some argue that the existing rules are not enough.[124]

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face questions of professional conduct that other lawyers do not face," (2) they "are subject to different legal obligations than other lawyers" (burdens of proof), (3) "the professional role of prosecutors is different from that of other lawyers who represent private clients in the adversarial context," and (4) "the traditional understandings relating to prosecutors' conduct are distinctive." Green, *supra* note 117, at 1576–78.

119. *See* TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 3.09 cmt. 1 (asserting "prosecutors should not exploit violations of a suspect's right to counsel").

120. *Id.*; *see id.* R. 8.04 (outlining examples of lawyer misconduct).

121. *See* MODEL RULES r. 3.8 cmt. 1 (recognizing a prosecutor has the responsibility to see that a defendant is afforded procedural justice); Green, *supra* note 117, at 1591 (indicating the prosecutor has a special responsibility to see that the accused is afforded justice and ensured the ability to exercise their procedural rights).

122. MODEL RULES r. 8.4.

123. *See Prosecution Function*, AM. BAR ASS'N, http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_blk.html (last visited May 12, 2016) (providing prosecutors should not use illegal means to gather evidence and must not encourage or employ others to do so).

124. Some legal scholars have proposed the judiciary draft a separate code of ethics that would apply exclusively to prosecutors and recognize their unique roles as minsters of justice; judiciary oversight of these conduct rules, as opposed to oversight by ABA, would avoid potential opposition from prosecutors' offices. *See* ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 147 (2007) (finding ABA Model Rule 3.8 (Special Responsibilities of a Prosecutor) is "vague and subject to interpretation" as it omits important ethical concerns and provides little clear guidance to prosecutors); Green, *supra* note 117, at 1587 ("If the courts, which generally oversee the conduct of lawyers, were to draw on their experience and on the prior literature to develop a comprehensive list of prosecutors' special responsibilities, and were to add new ones as necessary when new problems of prosecutorial conduct came to their attention, the list would include many responsibilities that are not presently reflected in the specific provisions of the Model Rules."); Henning, *supra* note 4, at 754 (arguing that while the Constitution grants the defendants a plethora of rights throughout criminal proceedings, there is still a significant gap between Constitutional protection and the ethical duties of the prosecutor).

The Supreme Court decided *Berger v. United States*[125] in 1935, writing an opinion that defined the role of the prosecutor as a representative of a sovereign rather than an ordinary party; thus, the prosecutor is a servant of the law whose interest should not be to win a case but to see that justice is done.[126] The Court held, "while he may strike hard blows, he is not at liberty to strike foul ones" and asserted "[i]t is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."[127] The plaintiffs have also spoken, saying prosecutors "have a basic duty to maintain the structure of the legal system."[128]

It has been held that actions intended to intrude upon the attorney–client relationship may constitute violations of the Constitution.[129] Additionally, the state has a duty under 18 U.S.C. § 3504 to disclose the existence of illegal electronic surveillance when an aggrieved party makes a prima facie showing that such surveillance has occurred.[130] Prosecutors should have voluntarily, as opposed to unknowingly, turned over to defense attorneys any illegally recorded phone calls between defense counsel and detainees. Furthermore, the prosecution should not have sought to benefit from any information gleaned from recorded attorney–client conversations, as such evidence would normally be excluded due to its illegal obtainment.[131]

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125. Berger v. United States, 295 U.S. 78 (1935).

126. *See id.* at 88 (holding a prosecutor is a servant of the law who has a twofold duty to ensure guilt shall not escape and to ensure innocence shall not suffer). Prosecutors enjoy discretion in bringing charges against an accused; however, they have a responsibility to bring charges only when the guilt of the accused is sufficiently certain. *See* Green, *supra* note 117, at 1588 (commenting on the duty of a prosecutor to see that innocent people are not wrongfully punished and to bring charges only when the evidence supports the guilt of the accused).

127. *Berger*, 295 U.S. at 88; *see also* United States v. Corona, 551 F.2d 1386, 1391 (5th Cir. 1977) ("We would be remiss if on this occasion we did not recall the heavy responsibility [of prosecutors] . . . to conduct criminal trials with an acute sense of fairness and justice.") (alteration in original) (quoting United States v. Dawson, 486 F.2d 1326, 1330 (5th Cir. 1973)); Bazelon, *supra* note 115, at 398 (emphasizing the Supreme Court's admonition that prosecutors may strike hard blows but not foul blows).

128. *See* Michael McLaughlin, *Texas Sheriff's Office Recorded Inmates' Calls with Attorneys, Lawsuit Alleges*, HUFFINGTON POST (Apr. 29, 2014, 7:59 PM), http://www.huffingtonpost.com/2014/04/29/travis-county-sheriff-records-inmates-phone-calls_n_5235157.html.

129. *See* Geders v. United States, 425 U.S. 80, 91 (1976) (holding a trial court's directive that a testifying defendant could not consult with attorney during recess denied the right to counsel).

130. *See* 18 U.S.C. § 3504 (2012) (stating "unlawful act" for purposes of the statute includes "the use of any electronic or mechanical devices in violation of the Constitution, laws of the United States, or any regulation or standard promulgated pursuant thereto").

131. The exclusionary rule is not merely a rule of evidence. It is derived from the Constitution and binding on the states through the Fourteenth Amendment. *See* Mapp v. Ohio, 367 U.S. 643, 655

The Supreme Court of Texas derives inherent power over the practice of law from the Texas Constitution.[132] In furtherance of its powers to supervise attorney conduct, it must prepare and adopt rules it considers necessary to discipline, suspend, or disbar attorneys.[133] The Supreme Court of the United States recognizes prosecutors' common law immunity from civil suit and generally leaves prosecutorial discipline to state bar authorities.[134] Prosecutorial misconduct is difficult to discover, which presents a problem when it comes to disciplining prosecutors.[135] Further, the threat of disciplinary action does not seem to deter or prevent

(1961) (holding "all evidence obtained by illegal searches and seizures and in violation of the Constitution is inadmissible in state court"); FELLMAN, *supra* note 63, at 291 (noting the exclusionary rule has two principles: (1) to deter unlawful or illegal police conduct and (2) to insure integrity in the judicial system and prevent the judiciary from being a party or allowing unlawful conduct). Evidence that is the derivative result of a violation may be suppressed where policy or constitutional doctrines justify suppression. Mosteller, *supra* note 5, at 1010. Suppression typically occurs when a privilege is violated by a party that is immediately involved in the litigation and the privilege that has been violated involves the attorney–client relationship. *See id.* (explaining the most common situation in which privileged information is suppressed by the trial court is when the derivative evidence is the result of an intrusion or violation of the attorney–client privilege).

132. Goldberg v. Comm'n for Lawyer Discipline, 265 S.W.3d 568, 575 (Tex. App.—Houston [1st Dist.] 2008, pet. denied).

133. *See* TEX. GOV'T CODE § 81.072 (West 2006) (outlining the requirements the Texas Supreme Court must follow when establishing a system for attorney disciplinary procedures).

134. The Supreme Court upheld absolute prosecutorial immunity to protect prosecutors from malicious litigation. *See* Imbler v. Pachtman, 424 U.S. 409, 424–25 (1976) (fearing that upholding only qualified immunity would lead to excessive actions against prosecutors by resentful, convicted defendants). The Court recognized defendants who were legitimately wronged by prosecutors' unethical conduct would be left without any remedy. *See id.* at 427 (noting absolute immunity "does not leave the genuinely wronged defendant without civil redress"); *see also* DAVIS, *supra* note 124, at 128 (discussing the unavailability of civil lawsuits as remedies against prosecutors who have committed acts of misconduct); Green, *supra* note 117, at 1585 (explaining civil remedies are generally not available to those harmed by prosecutorial misconduct and noting courts have a limited ability to punish prosecutors through methods such as dismissing indictments, suppressing evidence, or imposing contempt sanctions); Henning, *supra* note 4, at 818 ("The question of remedy in prosecutorial misconduct cases is further complicated by the almost complete unavailability of civil redress against a prosecutor."). However, the Court felt public policy encouraging the fearless and vigorous performance of prosecutorial duties is essential to the proper functioning of the justice system. *See Imbler*, 424 U.S. at 427–28 (concluding prosecutors have absolute civil immunity regarding misconduct that occurs in the exercise of the prosecutorial function); *see also* Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1, 39–40 (2009) (stating the Supreme Court's reasoning in *Imbler* rested on the belief that "if the aggrieved defendants could sue prosecutors civilly, 'harassment by unfounded litigation' might deflect prosecutors from performing their duties impartially" and with "courage and independence" (quoting *Imbler*, 424 U.S. at 423–24)).

135. *See* DAVIS, *supra* note 124, at 126 (noting, because prosecutorial misconduct is difficult to discover, much of the misconduct engaged in by prosecutors goes unchallenged); Henning, *supra* note 4, at, 729–30 (recognizing the difficulty in identifying prosecutorial misconduct because the point at which a hard blow becomes a foul one is almost impossible to identify).

misconduct effectively,[136] and the *Imbler v. Pachtman*[137] decision is the subject of considerable criticism.[138] Additionally, the reasoning behind *Imbler* ignores the pressures that prosecutors face through the course of their duties.[139] Another concern is that some prosecutors may be lax with their ethical standards because they know that most ethical violations will result in harmless error.[140] *Austin Lawyers Guild* provides a good opportunity to evaluate prosecutorial ethics and professional discipline of prosecutors. It is also important to take this opportunity seriously because the unethical behavior of prosecutors hurts numerous individuals as well

136. *See* DAVIS, *supra* note 124, at 128 (opining the Supreme Court's avoidance of prosecutorial misconduct by passing it on to state bar authorities has proven totally ineffective); Zacharias & Green, *supra* note 134, at 13 (concluding the disciplinary process does not play a significant role in influencing prosecutorial behavior); *see also* Henning, *supra* note 4, at 829 (pointing out there is agreement among legal scholars that "recommendations to bar associations to take disciplinary action" against prosecutors have "proved inadequate in addressing prosecutorial misconduct"); Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 GEO. L.J. 1509, 1517 (2009) (condemning the ineffectiveness of bar associations in disciplining prosecutors and noting that they have been lax in policing ethics). While many prosecutors are ethical, others are not. To discover unethical prosecutors, both prosecutors and defense attorneys must be aware of the potential abuses and act affirmatively to control them. *See* JOSEPH F. LAWLESS, PROSECUTORIAL MISCONDUCT 1–9 (LexisNexis, 3rd ed. 2003) (warning that to curb prosecutorial misconduct, both prosecutors and defense counsel should be aware of and vigilant of potential abuses).

137. Imbler v. Pachtman, 424 U.S. 409 (1976).

138. *See* DAVIS, *supra* note 124, at 130 (opining *Imbler* sends a message to prosecutors that their practices will be protected from discovery, and when they are discovered, challengers will not easily prevail); Henning, *supra* note 113, at 242 (criticizing the Supreme Court's decision in *Imbler* and the ineffectiveness of bar associations to adequately deter prosecutorial misconduct and citing reports showing misconduct played a role in nearly a quarter of all wrongful convictions in the 1990s and early 2000s); Johns, *supra* note 53, at 60–61 (discussing a 2000 study by the Innocence Project, which found prosecutorial misconduct played a part in 26% of wrongful conviction death row cases since 1999 and the prosecutors were not often held accountable). A 1999 study conducted by the Chicago Tribune showed from 1963 to 1999, 381 homicide convictions had been overturned as a result of serious prosecutorial misconduct such as the use of false evidence or the suppression of exculpatory evidence. Johns, *supra* note 53, at 62.

139. The Supreme Court's decision in *Imbler* fails to account for the pressures faced by prosecutors to have high conviction rates. *See* Henning, *supra* note 113, at 252–53 (urging the Supreme Court's view of prosecutors fails to account for the substantial pressure that prosecutors face). While not all prosecutors are elected officials, they still possess a vested interest in conviction rates, as they are used as an evaluation or job performance measure. *Id.* at 253.

140. *See* DAVIS, *supra* note 124, at 127 (explaining some prosecutors may be emboldened to act unethically by the harmless error rule because they can be sure their convictions will not be overturned if the evidence supports the defendant's guilt); Henning, *supra* note 113, at 242 (discussing a 2003 study conducted by the Center for Public Integrity of over 11,000 cases of prosecutorial misconduct that revealed approximately 2,000 cases were overturned, and while misconduct was found to have occurred in a number of other cases, courts refused to overturn the conviction based on the harmless error rule); Starr, *supra* note 136, at 1514 (criticizing the appellate remedy for violations of procedure—reversal and retrial—because, as a result of the harmless error doctrine, it is so rarely granted as prosecutorial misconduct is almost always considered harmless error).

as the integrity of our criminal justice system.[141] Some legal scholars call for modification and reform to the concept of prosecutorial immunity[142] or suggest that prosecutors be subject to, at least, qualified immunity.[143]

XII. CONCLUSION

Attorney–client communications should be afforded the utmost protection due to the sensitive nature of the information relayed and the need for clients to feel comfortable when speaking to their attorney. The importance of confidentiality and trust in the attorney–client relationship has been recognized by society and our legal system from the time of our nation's founding. State officials and prosecutors should not be allowed to continually get away with violations of the attorney–client privilege or gain an unfair advantage as a result of those violations. The legal system simply would not function properly without a fiercely protected attorney–client privilege.

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141. The abandonment of ethical behavior by prosecutors is detrimental to the criminal justice system as it undermines society's confidence in its integrity. *See* Henning, *supra* note 113, at 251 (commenting on the importance of holding prosecutors accountable for unethical conduct for the sake of maintaining "the integrity of the judicial system"); *see also* Bazelon, *supra* note 115, at 391 (addressing the serious problem that prosecutorial misconduct has the ability to undermine the integrity of the entire criminal justice system); Johns, *supra* note 53, at 125 (proposing the absolute immunity of prosecutors is against public policy because most prosecutors do not answer for their unethical conduct; thus, it dilutes society's faith in the criminal justice system).

142. Much of the criticism surrounding the absolute civil immunity of prosecutors is concerned with the changing legal landscape. Critics note the Supreme Court in *Imbler* justified absolute immunity of prosecutors based on old common law. Some scholars advocate that the policy concerns voiced by the court in *Imbler*, no longer carry as much weight. *See* Henning, *supra* note 113, at 240 (challenging the reasoning in *Imbler* because the legal landscape has changed drastically and justifications based on the common law of 1871 can no longer be supported); Zacharias & Green, *supra* note 134, at 11 (analyzing the Supreme Court's reasoning in *Imbler*); *see also* Johns, *supra* note 53, at 108 (emphasizing in 1871, the American criminal justice system bore little resemblance to the criminal justice system we know today).

143. *See* Henning, *supra* note 113, at 265 (proposing a compromise that would limit the class of plaintiffs who would be entitled to bring suit against prosecutors after a showing of actual innocence, and only then could a suit be brought against a prosecutor under 42 U.S.C. § 1983); Zacharias & Green, *supra* note 134, at 58 (advocating a competence rule should somehow be implemented into ethics codes or statutes, which would hold prosecutors accountable for their actions and assist regulators in pursuing the core goal that prosecutors seek just results); *see also* Johns, *supra* note 53, at 107 (expressing qualified immunity should apply in all cases of alleged prosecutorial misconduct because it is supported by both history and public policy, it would shield the honest prosecutor from frivolous litigation, and it would afford real victims a remedy when prosecutors have intentionally violated any clearly established Constitutional guarantees). *But see* Starr, *supra* note 136, at 1518–19 (advocating sentence reduction as a better remedy for prosecutorial misconduct than allowing prosecutors to be amenable to civil suit because of the high costs of civil litigation and the prevalent poverty of criminal defendants).

The plaintiffs in *Austin Lawyers Guild v. Securus Technologies, Inc.* should be afforded the injunctive and declaratory relief they seek. Additionally, the court must consider taking action against prosecutors who have used illegally obtained information to win their cases. While prosecutors are generally immune from civil liability, they could face professional discipline from the State Bar of Texas for breaching their Bar-appointed ethical duties. This case provides a prime opportunity for the legal community to reconsider the current state of prosecutorial immunity and to evaluate its impact on the ethical aspects of the criminal justice system.